



HARVARD LAW SCHOOL  
Environmental & Energy Law Program

# The Case Against Direct FERC Regulation of DER Energy Sales

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# DERs are Kind of a Big Deal

- They change utility planning and operations
- They defy assumptions embedded in traditional ratemaking
- They enable third-parties (not utility or ratepayer) to connect to the distribution system
- They reduce (or change) the need for utility infrastructure

# Federal Power Act

## FERC Jurisdiction

“Transmission of electric energy in interstate commerce and [] the sale of electric energy at wholesale in interstate commerce”

Rules and practices directly affecting those rates

- i.e., wholesale demand response

## State Jurisdiction

“Any other sale” of electric energy

- Retail rates
- Intrastate wholesale sales

Power plants

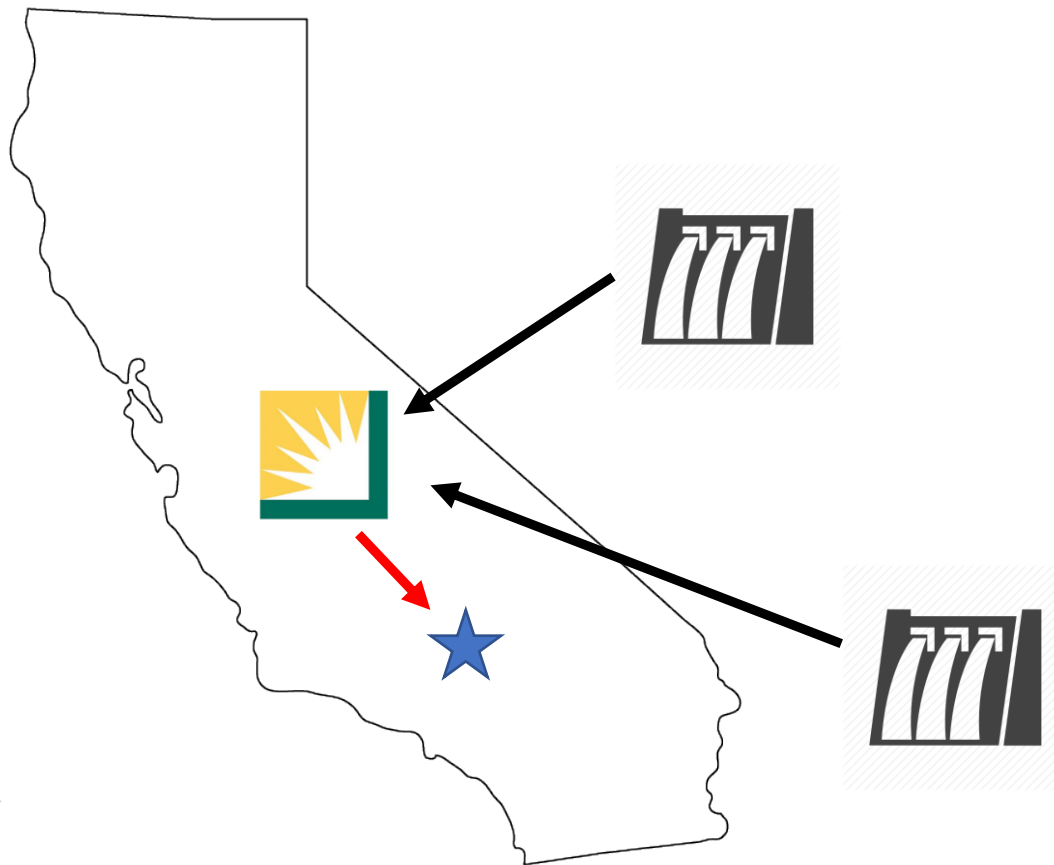
- Siting
- Utility portfolios

Distribution

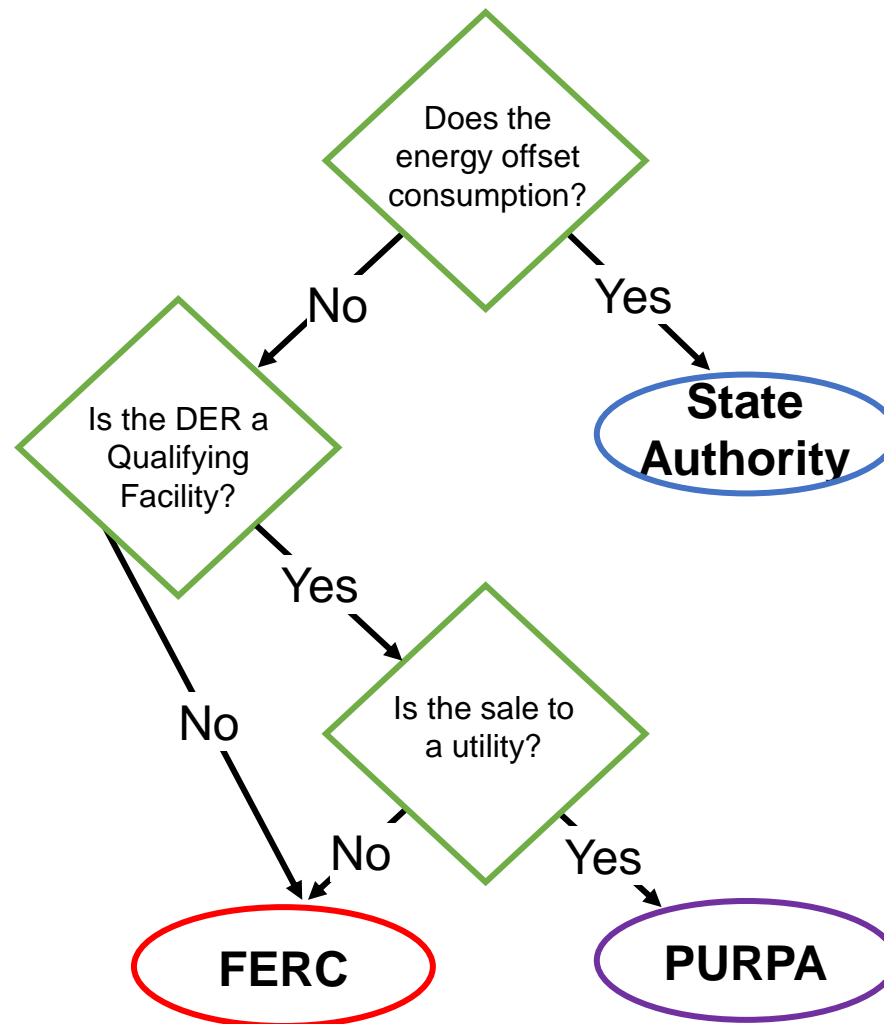


# FERC Jurisdiction over Energy Sales

Supreme Court, 1964: Sale by CA utility to CA municipality is “in interstate commerce”



# Fragmented Authority over DER Energy Sales



# FERC Orders about DERs

- Net Metering Orders (*SunEdison*)
- Demand response (Order Nos. 719, 745, *FERC v. EPSA*)
- Energy Storage (Order No. 841)
- Energy Efficiency Aggregations (*AEE*)
- DER Aggregations (pending NOPR)

# FERC Jurisdiction over DER Energy Sales

## **FERC should disclaim jurisdiction over DER energy sales.**

- Legal argument: sales by a DER to a local buyer are “other sales” and not wholesale sales “in interstate commerce”

# FERC Jurisdiction over DER Energy Sales

FERC tersely rejected my proposal:

72. We deny SMUD's request that the Commission clarify that distribution-level facilities and distribution-level feed-in tariffs do not implicate Commission jurisdiction. The FPA grants the Commission exclusive jurisdiction to regulate sales for resale of electric energy and transmission in interstate commerce by public utilities.<sup>99</sup> The Commission's FPA authority to regulate sales for resale of electric energy and transmission in interstate commerce by public utilities is not dependent on the location of generation or transmission facilities, but rather on the definition of, as particularly relevant here, wholesale sales contained in the FPA.<sup>100</sup>

*California Public Utilities Commission*, 132 FERC ¶ 61,047 at P 72 (2010)



# FERC Jurisdiction over DER Energy Sales

## FERC may change its view:

- “agency action representing a policy change [need not] be justified by reasons more substantial than those required to adopt a policy in the first instance.”
- An agency “must show that there are good reasons for the new policy. But it need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better.”

FCC v. Fox Television Stations, 556 U.S. 502 (2009)

# FERC Jurisdiction over DER Energy Sales

## Footnote “supporting” FERC’s order:

<sup>100</sup> 16 U.S.C. § 824(d) (2006); *see Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 695-96 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002); *Detroit Edison Co. v. FERC*, 334 F.3d 48, 51 (D.C. Cir. 2003). *See also FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972) (finding a utility with no direct connections to any out-of-state utility and that sold no power to out-of-state utilities to be subject to the jurisdiction of the Commission due to the fact that power supplied to a bus from a variety of sources was merged and commingled).

# Cases Cited by FERC in 2010 Order

## *Transmission Access Policy Study Group:*

“FPA § 201(a) makes clear that all aspects of wholesale sales are subject to federal regulation, regardless of the facilities used. . . . Moreover, various cases support the proposition that FERC regulates all aspects of wholesale transactions.”

[followed by citations to 1950s/60s appeals courts decisions]



# Cases Cited by FERC in 2010 Order

## *Detroit Edison:*

“FERC has jurisdiction over all interstate transmission service and over all wholesale service”

# Cases Cited by FERC in 2010 Order

## *Florida Power & Light:*

“We do not find it necessary to approve or disapprove the Federal Power Commission's analysis based on unity of electromagnetic response. Its alternative assertion that energy commingles in a bus is, in our opinion, sufficient to sustain jurisdiction.”



# What Does “in interstate commerce” Mean?

## Federal Power Act § 201

“For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof . . .”

# What Does “in interstate commerce” Mean?

## Natural Gas Act § 2

“Interstate commerce” means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof . . .”

# What Does “in interstate commerce” Mean?

FERC’s “initial jurisdiction determination ‘was to follow the flow of electric energy,’” but this “engineering and scientific test” is superseded by a “legalistic or governmental test.”

Connecticut Light & Power v. FPC, 376 U.S 515 (1945)



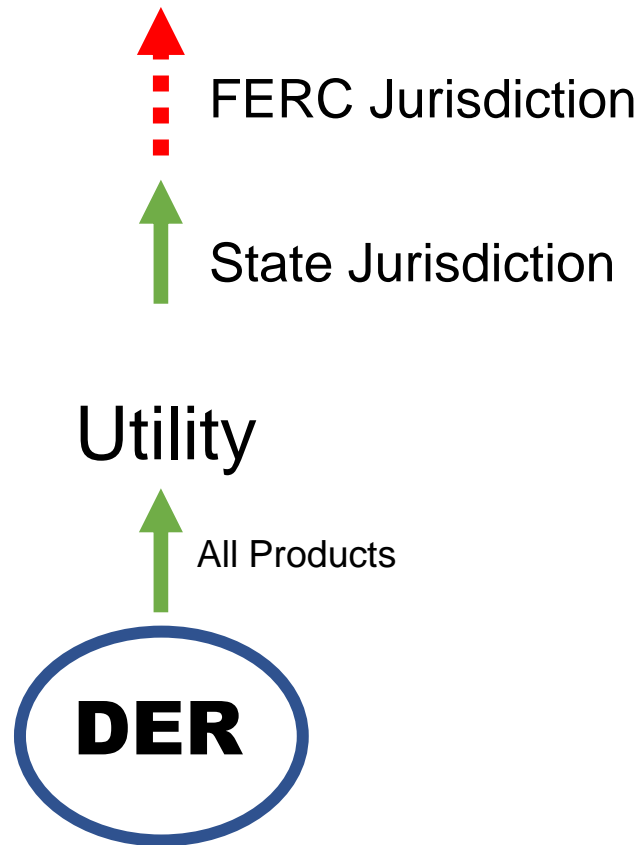
# What Does “in interstate commerce” Mean?

Even if FERC could assert authority over DER energy sales, it may decline to do so:

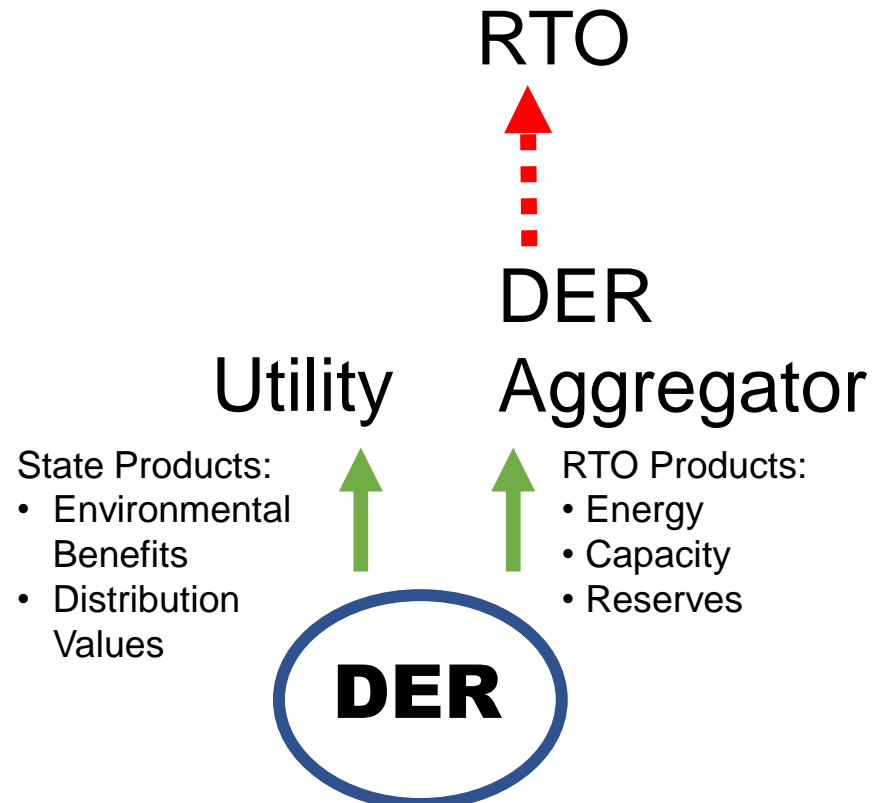
- FERC “had discretion to decline to assert [] jurisdiction [over certain transactions], in part because of the complicated nature of the jurisdictional issues.”

New York v. FERC, 535 U.S. 1 (2002)

# DER Development Models



*Model 1: Utility-Centric*



*Model 2: Aggregation-RTO*

